April 23, 2018

VIA ELECTRONIC MAIL

TO: CURRENT SERVICE LIST

CALIFORNIA WATERFIX HEARING – RULING ON MOTION TO STRIKE, MOTION FOR RECONSIDERATION, AND PETITIONERS' CASE-IN-CHIEF EXHIBITS

This ruling addresses (1) a motion to strike certain testimony provided during Natural Resources Defense Council, et al.'s (NRDC) cross-examination of Petitioners' Panel 2 witnesses; (2) the Department of Water Resources' (DWR) motion for reconsideration of our prior ruling regarding the Pacific Coast Federation of Fishermen's Associations, et al.'s (PCFFA) subpoena served on the California Department of Fish and Wildlife (CDFW); and (3) disposition of Petitioners' Part 2 case-in-chief exhibits. For the reasons provided below, we hereby grant the motion to strike, deny the motion for reconsideration, and accept Petitioners' Part 2 case-in-chief exhibits into the evidentiary record.

Downey Brand Protestants' Motion to Strike

On February 28, 2018, Doug Obegi, counsel for NRDC, conducted cross-examination of Petitioners' Panel 2 case-in-chief witnesses. During that cross-examination, Mr. Obegi presented some of those witnesses with exhibits and asked that they recite selections from them, describe selections from them, or confirm Mr. Obegi's characterization of their contents. Meredith Nikkel objected that this testimony was hearsay, to the extent that it was offered for the truth of the matters being stated, and that it lacked foundation. On March 23, 2018, with the benefit of the hearing transcript for reference, protestants represented by Downey Brand LLP and Somach, Simmons & Dunn, PC (the Downey Brand Protestants),[1] filed a written objection and motion to strike specified portions of the oral testimony provided during Mr. Obegi's cross-examination of Petitioners' Panel 2 case-in-chief witnesses on the same grounds provided orally on February 28, 2018.

[1] The following protestants filed the motion: Reclamation District 108, Carter Mutual Water Company, El Dorado Irrigation District, El Dorado Water & Power Authority, Howald Farms, Inc., Maxwell Irrigation District, Natomas Central Mutual Water Company, Meridian Farms Water Company, Oji Brothers Farm, Inc., Oji Family Partnership, Pelger Mutual Water Company, Pleasant Grove-Verona Mutual Water Company, Princeton-Cordora-Glenn Irrigation District, Provident Irrigation District, Sacramento Mutual Utility District, Henry D. Richter, et al., River Garden Farms Company, South Sutter Water District, Sutter Extension Water District, Sutter Mutual Water Company, Tisdale Irrigation and Drainage Company, Windswept Land and Livestock Company, North Delta Water Agency, Reclamation District 999, Reclamation District 2060, Reclamation District 2068, Brannan-Andrus Levee Maintenance District, Reclamation District 407, Reclamation District 2067, Reclamation District 317, Reclamation District 551, Reclamation District 563, Reclamation District 150, Reclamation District 2098, Reclamation District 800 (Byron Tract), Tehama-Colusa Canal Authority, and Glenn-Colusa Irrigation District.

On March 27, 2018, NRDC filed a written opposition to this written objection, asserting the official records exception to the hearsay rule, that the testimony pertains to documents that are or will be entered into evidence, that several of the documents are referenced in the witnesses' written testimony, and that Mr. Obegi was properly laying foundation for opinion testimony. Alternatively, NRDC asks that we reject the Downey Brand Protestants' motion to strike as untimely because it was not made until the conclusion of NRDC's cross-examination.

We grant the motion to strike because the testimony in question has no probative value.[2] Each of the excerpts identified in the Downey Brand Protestants' motion to strike includes Mr. Obegi prompting a witness to confirm or characterize the contents of a document in front of them. In the transcript, Mr. Obegi's questioning along these lines continues for several pages without ever asking a witness to offer an *opinion* regarding the contents they were just asked to confirm or characterize. Such questioning is an improper use of cross-examination because it cannot result in testimony with any evidentiary value distinct from the documents themselves. It therefore has no place in the evidentiary record for this proceeding.

NRDC's argument that Mr. Obegi was merely laying foundation fails because none of the excerpts in question were followed by questions asking the witnesses' opinion. Because Ms. Nikkel waited until the conclusion of Mr. Obegi's cross-examination to lodge the oral objection and motion to strike, NRDC cannot claim that it was just laying foundation for opinion questions that it never got an opportunity to ask.[3] In any event, laying foundation for any opinion those witnesses might have offered would not have required reading contents aloud into the record to the extent Mr. Obegi did, or prompted the witnesses to do.

The cross-examination at issue here is a more pronounced example of a trend we have noticed among several parties using exhibits during cross-examination. We therefore take this opportunity to provide all parties guidance in the hope that it will help those parties correct course and streamline future cross-examination.

The purpose of cross-examination is to elicit favorable testimony from the witness or to impeach the witness. Merely asking the witness to recite or confirm the content of a document that can be introduced independently does not add value to the evidentiary record. We remind the parties that exhibits that tend to refute a witness's testimony can be introduced during rebuttal, provided that they are properly authenticated.

Further, reciting extensive text from an exhibit generally is not necessary to lay a foundation for questioning the witness about that exhibit. The cross-examining party need only identify portions of an exhibit to the extent necessary to ask the witness about it. Again, prompting a witness to read the contents of documents into the record has no evidentiary value independent of the document itself. Such cross-examination also increases the risk that parties will

[2] Because we are granting the motion on this basis, we need not address whether and to what extent the recitation of excerpts from the documents that formed the basis of NRDC's cross-examination constitutes hearsay.

[3] NRDC's argument that the Downey Brand Protestants' objection needed to be raised earlier so that they could cure any defect in their cross-examination is curious, and misplaced. The Downey Brand Protestants could not have known that Mr. Obegi wasn't simply laying foundation for opinion testimony until Mr. Obegi concluded his cross-examination without having followed through with any opinion questions. In any event, NRDC cites no authority for the proposition that it was entitled to the opportunity to cure defective cross-examination.

mistakenly characterize the witnesses' recitations as actual expert opinion testimony when summarizing the evidence later in the hearing. We expect the parties to bear these concerns in mind as they prepare for cross-examination during future stages of this hearing.

DWR's Motion for Reconsideration

On March 16, 2018, we denied CDFW's motion for a protective order limiting the scope of a subpoena served by PCFFA on CDFW. In our ruling, we rejected CDFW's argument that documents pertaining to (1) existing compliance with the California and federal Endangered Species Acts (CESA and ESA, respectively) and (2) existing operation of the State Water Project and Central Valley Project are not relevant to the State Water Board's consideration of the WaterFix Project. On March 26, 2018, DWR filed a motion for reconsideration of that ruling, arguing that it expands the scope of Part 2 beyond what is described in the October 31, 2015 Hearing Notice and subsequent rulings interpreting Part 2 scope.

DWR is incorrect in its assertion that existing conditions and existing operations of the State Water Project and Central Valley Project are beyond the scope of Part 2 key hearing issues, for two reasons. First, discerning whether the proposed changes to Petitioners' water rights are likely to have unreasonable impacts on fish, wildlife, recreation, or other public trust resources requires that we consider the possibility that some project impacts may appear reasonable when viewed in isolation but unreasonable when considered cumulatively with other, pre-existing environmental stressors. Even if a project's incremental impacts will be relatively minor, the reasonableness of those impacts could vary significantly depending on pre-existing conditions. For example, whether a relatively minor impact to a species is reasonable may depend on whether that species is already on the brink of collapse or instead is one that is relatively robust and better able to absorb or adapt to adverse environmental impacts. As we noted in our prior ruling, Petitioners themselves appear to have recognized the relevancy of this type of evidence in their case-in-chief by advancing claims that the project will not have unreasonable impacts on various public trust resources because protections at or near existing levels will be maintained.[4]

Second, existing environmental conditions and existing project operations are relevant to our consideration of appropriate Delta flow criteria in accordance with the Sacramento-San Joaquin

[4] DWR's motion states that it never opened the door to evidence regarding the adequacy of existing regulatory requirements with respect to the protection of public trust resources, and that "[a]t no point have Petitioners put into issue the existing protectiveness of these regulatory requirements." Mot. for Reconsider., pp. 3-4. Contrary to this statement, however, the written and direct testimony of at least one of Petitioners' key witnesses, Dr. Marin Greenwood, repeatedly characterized existing regulatory requirements as "reasonably protective." (*See, e.g.*, DWR-1012, p. 4 ["Existing reasonable operational protection of low salinity zone fall rearing habitat for Delta Smelt will be maintained …."], p. 7 ["CWF H3+ will maintain existing reasonable protection of Delta Smelt fall rearing habitat"], pp. 14-15, 17, 34 [referring to existing levels of entrainment risk for various fish species, "which in my opinion are reasonably protective"]; *see also* Testimony of Richard Wilder – Signed, DWR-1013-signed, p. 6, n. 2 ["Throughout my testimony I describe various measures that will be included in the CWF for the protection of fisheries. For those species that are protected by the Endangered Species Act (ESA), the level of protection that I have analyzed is that it must be consistent with the requirements of the ESA, pertinent biological opinions and other applicable requirements, including the Fish and Game Code and Water Code."], pp. 38-39 [testifying that CWF H3+ will "maintain reasonably protective upstream flow and water temperature conditions for upstream spawning, rearing, and migration of Pacific and River Lamprey"].)

Delta Reform Act of 2009 (the Delta Reform Act). The pertinent text in the provision of the Delta Reform Act that informs Part 2 key hearing issues reads:

> Any order approving a change in the point of diversion of the State Water Project or the federal Central Valley Project from the southern Delta to a point on the Sacramento River shall include appropriate Delta flow criteria and shall be informed by the analysis conducted pursuant to this section. (Wat. Code, § 85086, subd. (c)(2).)

As explained more fully in the October 31, 2015 Hearing Notice, this statute supplements the Water Code's ordinary requirements for consideration of water right change petitions. In considering what Delta flow criteria are "appropriate," the Delta Reform Act requires that the State Water Board consider the 2010 Delta Flow Criteria Report, a document analyzing the flows necessary to protect public trust resources in the Delta generally. (*See* Wat. Code, § 85086, subd. (c)(1).) In this context, we cannot conclude that evidence regarding existing environmental conditions affecting public trust resources, or regarding existing project operations, is categorically irrelevant to the State Water Board's consideration of Part 2 key hearing issues. Therefore, our prior ruling denying CDFW's motion to quash PCFFA's subpoena stands.

Disposition of Petitioners' Part 2 Case-In-Chief Exhibits

Throughout Part 2, we have accepted case-in-chief exhibits into evidence once cross-examination of a party's last case-in-chief witness has been completed. On April 6, 2018, DWR complied with our direction to provide revised responses to Patrick Porgans' written cross-examination questions. We have received no objections to those responses. Those responses complete cross-examination of Petitioners' Part 2 case-in-chief witnesses, thereby completing Petitioners' Part 2 case-in-chief. Therefore, the following exhibits are hereby accepted into the evidentiary record:

> DOI-39 through DOI-41
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> DWR-1000 through DWR-1012, DWR-1013-signed, DWR-1014 through DWR-1069, DWR-1071 through DWR-1078, DWR-1081 through DWR-1095, DWR-1097, DWR-1098, DWR-1100 through DWR-1142
>
> SWRCB-102, SWRCB-104 through SWRCB-112

If you have any non-controversial, procedural questions about this ruling or other matters related to the California WaterFix Hearing, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.

Sincerely,

ORIGINAL SIGNED BY:

Felicia Marcus, State Water Board Chair
WaterFix Project Co-Hearing Officer

ORIGINAL SIGNED BY:

Tam M. Doduc, State Water Board Member
WaterFix Project Co-Hearing Officer